

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

EDWARD B. SPENCER,
Plaintiff,

v.

L. VALDEZ, et al.,
Defendants.

No. 1:23-cv-00357-JLT-SAB (PC)

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DEFENDANTS'
MOTION TO REVOKE PLAINTIFF'S IN
FORMA PAUPERIS STATUS BE GRANTED

(ECF No. 29)

Plaintiff is proceeding pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983.

Currently before the Court is Defendants' motion to revoke Plaintiff's in forma pauperis status, filed April 29, 2024.

I.

BACKGROUND

This action is proceeding on Plaintiff's retaliation claim against Defendants L. Valdez and D. Parra. (ECF No. 17.)

On July 31, 2023, Defendants filed an answer to the complaint. (ECF No. 21.)

On September 5, 2023, the Court issued the discovery and scheduling order. (ECF No. 27.)

As previously stated, on April 29, 2024, Defendants filed a motion to revoke Plaintiff's in

1 forma pauperis status. (ECF No. 29.) On June 3, 2024, Plaintiff filed an opposition to
 2 Defendants' motion, and Defendants filed a reply on June 17, 2024. (ECF Nos. 33, 34.)

3 II.

4 LEGAL STANDARD

5 The Prison Litigation Reform Act of 1995 (PLRA) was enacted "to curb frivolous
 6 prisoner complaints and appeals." Silva v. Di Vittorio, 658 F.3d 1090, 1099-1100 (9th Cir. 2011).
 7 28 U.S.C. § 1915(g) provides that "In no event shall a prisoner bring a civil action ... under this
 8 section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any
 9 facility, brought an action or appeal in a court of the United States that was dismissed on the
 10 grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted,
 11 unless the prisoner is under imminent danger of serious physical injury." "[I]f the language of a
 12 statute is clear, we look no further than that language in determining the statute's meaning,"
 13 unless "what seems to be the plain meaning of the statute ... lead[s] to absurd or impracticable
 14 consequences." Seattle-First Nat'l Bank v. Conaway, 98 F.3d 1195, 1197 (9th Cir. 1996) (internal
 15 quotations and citations omitted).

16 In Andrews v. King, 398 F.3d 1113, 1121 (9th Cir. 2005), the Ninth Circuit explained,
 17 "The PLRA does not define the terms 'frivolous,' or 'malicious,' nor does it define dismissals for
 18 failure to 'state a claim upon which relief could be granted.' We have held that the phrase 'fails to
 19 state a claim on which relief may be granted,' as used elsewhere in § 1915, 'parallels the language
 20 of Federal Rule of Civil Procedure 12(b)(6)'. In defining the terms frivolous and malicious, the
 21 Andrews court stated that, 'we look to their 'ordinary, contemporary, common meaning.' Thus, a
 22 case is frivolous if it is 'of little weight or importance: having no basis in law or fact.' A case is
 23 malicious if it was filed with the 'intention or desire to harm another.' " Andrews, 398 F.3d at
 24 1121 (internal quotations and citations omitted).

25 The Andrews court further noted, "[n]ot all unsuccessful cases qualify as a strike under §
 26 1915(g). Rather, § 1915(g) should be used to deny a prisoner's IFP status only when, after careful
 27 evaluation of the order dismissing an action, and other relevant information, the district court
 28 determines that the action was dismissed because it was frivolous, malicious or failed to state a

claim.” Id. at 1121. In making the determination whether a dismissal counts as a strike, it is the substance of the dismissal, which is determinative, not the styling of the dismissal. El-Shaddai v. Zamora, 833 F.3d 1036, 1042 (9th Cir. 2016); O’Neal v. Price, 531 F.3d 1146, 1153 (9th Cir. 2008).

In seeking revocation of Plaintiff’s in forma pauperis status, Defendants bear the burden of establishing that Plaintiff has three or more strikes within the meaning of section 1915(g), which requires the submission of evidence sufficient to demonstrate at least three prior qualifying dismissals. Andrews, 398 F.3d at 1120. “Once the defendants have met this initial burden, the burden then shifts to the prisoner, who must attempt to rebut the defendants’ showing by explaining why a prior dismissal should not count as a strike.” Id. “In sum, once a prisoner has been placed on notice of the potential disqualification under 1915(g) by either the district court or the defendant, the prisoner bears the ultimate burden of persuading the court that § 1915(g) does not preclude IFP status.” Id.

III.

DISCUSSION

Defendants seek to dismiss this action because Plaintiff has at least three previous suits that courts have dismissed for being frivolous, malicious, or failing to state a claim, and Plaintiff did not allege that he was in imminent danger of serious physical injury at the time the operative complaint was filed.

In opposition, Plaintiff argues that Defendants seek to relitigate the same underlying question that was previously resolved in Spencer v. Beard, No. 1:19-cv-01615 DAD HBK, 2021 WL 3418677 (E.D. Cal. Aug. 5, 2021), which is barred by collateral estoppel. (ECF No. 33.)

In response, Defendants argue that the doctrine of collateral estoppel does not apply in this case, and Plaintiff still has at least four lawsuits that courts have determined fail to state a claim. (ECF No. 34.)

A. Collateral Estoppel

For the doctrine of collateral estoppel to apply, there are three factors to consider: “(1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have

1 been actually litigated by the party against whom preclusion is asserted in the prior litigation; and
 2 (3) the determination of the issue in the prior litigation must have been a critical and necessary
 3 part of the judgment in the earlier action.” Sams v. Diaz, No. 2:22-cv-0568 JAM DMC, 2022 WL
 4 624997 at * 3 (E.D. Cal., Mar. 2, 2022) (quoting McQuillion v. Schwarzenegger, 369 F.3d 1091,
 5 1096 (9th Cir. 2004).)

6 As explained more fully below, the decision in Spencer v. Beard as to the specific issue of
 7 whether to consider a voluntary dismissal a strike was not a critical and necessary part of the
 8 judgment on the merits of that case. The strike determination was not a decision on the merits and
 9 the matter was allowed to continue. Further, this issue was not litigated either by Defendant Parra
 10 or Defendant Valdez, who were not parties to that action. Rather, this issue was litigated by a
 11 different party, C. Carlson. Thus, the doctrine of collateral estoppel is applicable and there is no
 12 merit to Plaintiff’s argument.

13 **B. Three or More Strikes Under Section 1915(g)**

14 Defendants submit that Plaintiff has suffered three or more strikes in the following cases
 15 of which the Court takes judicial notice:¹

16 1. Spencer v. Beeler, No. 1:13-cv-01624 JLO BAM (E.D. Cal. Sept. 22, 2014). On
 17 August 20, 2014, the Court dismissed Plaintiff’s complaint for failure to state a cognizable claim
 18 for relief and granted him leave to amend within thirty days. (Request for Judicial Notice (RJN),
 19 Exhibit (Ex.) 1, Order, ECF No. 11.) On September 8, 2014, Plaintiff filed the instant motion
 20 requesting voluntary dismissal of this action pursuant to Federal Rule of Civil Procedure 41(a) (1)
 21 without prejudice. (RJN, Ex. 2, ECF No. 12.) On September 22, 2014, the Court issued an order
 22 granting Plaintiff’s request for voluntary dismissal without prejudice pursuant to Rule 41(a).
 23 (RJN, Ex. 3, ECF No. 14.)

24 2. Spencer v. Kokor, No. 1:17-cv-00597 LJO JLT (E.D. Cal. Apr. 6, 2018). On July
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26 ¹ Pursuant to Federal Rule of Evidence 201, the court may take judicial notice of “adjudicative facts” (e.g., court
 27 records, pleadings, etc.) and other facts not subject to reasonable dispute and either “generally known” in the
 28 community or “capable of accurate and ready determination by reference to sources whose accuracy cannot be
 reasonably questioned.” Fed. R. Evid. 201(b); Bennett v. Medtronic, Inc., 285 F.3d 801, 803 n.2 (9th Cir. 2002)
 (“[W]e may take notice of proceedings in other courts, both within and without the federal judicial system, if those
 proceedings have a direct relation to matters at issue”) (internal quotation omitted).

24, 2017, the Court issued an order dismissing Plaintiff's complaint for failing to state a cognizable claim and granted him leave to amend within twenty-one days. (RJN, Ex. 4, ECF No. 8.) Plaintiff filed his FAC on August 18, 2017. (RJN, Ex. 5, ECF No. 10.) On March 13, 2018, the Court issued findings and recommendations (F&R) to dismiss this action with prejudice for failure to state a cognizable claim. (RJN, Ex. 6, ECF No. 15.) On April 5, 2018, Plaintiff filed objections to the F & R. (RJN, Ex. 7, ECF No. 18.) In his objections, Plaintiff argued that a magistrate judge does not have jurisdiction to screen this case and requests that the undersigned not accept the F&R, but instead, and to avoid a strike under 28 U.S.C. § 1915(g), Plaintiff then requested to voluntarily dismiss this action without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1). (*Id.*) On April 6, 2018, the district judge issued an order overruling Plaintiff's objection to the magistrate judge's screening orders and granted his request to dismiss this action without prejudice under Rule 41(a)(1)(i). (RJN, Ex. 8, ECF No. 19.) However, the Court noted that it cannot grant Plaintiff's request not to count his voluntary dismissal of this action as a strike against him under 28 U.S.C. § 1915(g). (*Id.*)

3. Spencer v. Sherman, No. 1:17-cv-01025 LJO EPG (E.D. Cal. Apr. 25, 2018). On April 2, 2018, the Court issued F&R to dismiss this action without leave to amend for failure to state a claim under the relevant legal standards. (RJN, Ex. 9, ECF No. 12.) The Court noted that the Plaintiff has amended his complaint once already and that further amendment would be futile. (*Id.*) On April 23, 2018, Plaintiff filed objections to the F&R. (RJN, Ex. 10, ECF No. 13.) On April 25, 2018, the district judge issued an order adopting the F&R in full and dismissing Plaintiff's complaint without leave to amend for failing to state a cognizable claim. (RJN, Ex. 11, ECF No. 17.)

4. Spencer v. Kokor, No. 1:17-cv-01561 LJO BAM (E.D. Cal. June 26, 2018). On May 30, 2018, the Court issued F&R to dismiss this action without leave to amend for failure to state a claim for relief. (RJN, Ex. 12, ECF No. 12.) On June 7, 2018, Plaintiff timely filed objections, arguing that the Court ignored his allegations that Defendant Kokor failed to treat Plaintiff's pain and cramping for over 67 months. On June 26, 2018, the district judge issued an order finding Plaintiff's objections unpersuasive and dismissing Plaintiff's complaint with

prejudice, due to Plaintiff's failure to state a claim upon which relief may be granted. (RJN, Ex. 13, ECF No. 14.)

Based on the four cases cited above, the Court finds that Plaintiff has incurred three or more "strikes" under § 1915(g) prior to filing the instant civil action.

C. Prior Three Strikes Determination and Voluntary Dismissals

While some courts have found that a voluntary dismissal does not count as a strike under § 1915(g),² this Court has recently determined otherwise.³ On January 17, 2024, the Court issued an order in Spencer v. Pulido-Esparza, 1:20-cv-01176-JLT-GSA (E.D. Cal. Aug. 10, 2023), directing Plaintiff to show cause why his IFP status should not be revoked pursuant to 28 U.S.C. § 1915(g). (RJN, Ex. 14, ECF No. 37). On February 15, 2024, the Court issued an order recommending Plaintiff's IFP status be revoked pursuant to 28 U.S.C. § 1915(g) and that he be required to pay the filing fee in full. (Pulido-Esparza, RJN, Ex. 15, ECF No. 40.) On March 18, 2024, the Court adopted the F&R and declared Plaintiff a "three-strikes litigant" pursuant to the following closed cases brought by Plaintiff within the meaning of 28 U.S.C. § 1915(g). (Pulido-Esparza, RJN, Ex. 16, ECF No. 43.)

As noted above, Plaintiff voluntarily dismissed both Beeler and Kokor without prejudice, and Plaintiff's request in Kokor to not count the dismissal as a strike was denied. (RJN, Ex. 8, ECF No. 19.) In Spencer v. Beard, No. 1:19-cv-01615 DAD HBK, 2021 WL 3418677 (E.D. Cal. Aug. 5, 2021), the Court found that Plaintiff's voluntary dismissal after the Court's finding of a failure to state a claim in Beeler did not constitute a strike under 1915(g). However, in Pulido-Esparza, the Court disagreed finding the Ninth Circuit's holdings in El-Shaddai v. Zamora, 833

² See, e.g., Avery v. Stainer, No. 2:18-cv-01302 JAM AC P, 2021 WL 1153773, at *3 (E.D. Cal. Mar. 26, 2021); Brown v. Milburn, No. 3:23-cv-00038 JMK, 2023 WL 7340355 (D. Alaska Nov. 7, 2023); Peck v. Dorsey, No. 2:19-cv-1023 SAB, 2019 WL 6499109, at *4 (D. Nev. Dec. 3, 2019); McDowell v. Haskell, No. 2:20-cv-300 RMP, 2020 WL 8920937, at *7 (E.D. Wash. Sept. 21, 2020); James v. James, No. 2:19-cv-0020 SLG, 2019 WL 4169877, at *7 (D. Alaska Sept. 3, 2019); Gansert v. Orange County, No. 8:19-cv-1999 JGB JDE, 2019 WL 8108749, at *6 (C.D. Cal. Nov. 7, 2019); Morrison v. Christensen, No. 1:20-cv-0566 DCN, 2021 WL 1061973, at *6 & n.2 (D. Idaho Mar. 19, 2021).

³ See, e.g., Spencer v. Milan, No. 1:20-CV-00682-JLT-GSA PC, 2024 WL 639907, at *10 (E.D. Cal. Feb. 16, 2024) (voluntary dismissals after a finding that an inmate's complaint fails to state a claim are, in fact, strikes within the meaning of Section 1915(g)), report and recommendation adopted, 2024 WL 1155848 (E.D. Cal. Mar. 18, 2024);

1 F.3d 1036 (9th Cir. 2016),⁴ Knapp v. Hogan, 738 F.3d 1106 (9th Cir. 2013),⁵ and Harris v.
 2 Mangum, 863 F.3d 1133 (9th Cir. 2017),⁶ clearly refute the findings of the Beard Court. (Pulido-
 3 Esparza, RJN, Ex. 15, ECF No. 40.)

4 In Pulido-Esparza, the Court noted that El-Shaddai, Knapp, and Harris collectively
 5 suggest that if a complaint fails to state a claim for relief or is frivolous or malicious, and the
 6 Plaintiff fails to amend the complaint and the case is dismissed (either by the Court or by
 7 voluntary dismissal of Plaintiff) such dismissal constitutes a strike under § 1915(g). In making
 8 such determination, the Court pointed out that several district courts have reach the same
 9 conclusion. See, e.g., Sumner v. Tucker, 9 F. Supp. 2d 641, 643-44 (E.D. Va. 1998) (stating
 10 voluntary dismissal does not relieve Plaintiff of consequences of filing frivolous action under
 11 Section 1915(g)); Garrett v. Diaz, 3:21-cv-00265 WQH MDD, 2021 WL 3209913, at *3 (S.D.
 12 Cal. July 29, 2021) (counting voluntary dismissal as strike under Section 1915(g)); Williams v.
 13 Paramo, No. 3:17-cv-02596 MMA BLM, 2018 WL 11271064, at *3 (S.D. Cal. Mar. 1, 2018)
 14 (counting Plaintiff's voluntary dismissals as strikes under Section 1915(g)); Meador v. Brown,
 15 No. 2:18-cv-00696 KJM AC, 2018 WL 2688131, at *5 (E.D. Cal. June 4, 2018) (stating
 16 irrespective of voluntary dismissal, pre-dismissal findings and recommendations that filing was
 17 improper "rang the PLRA bells" of frivolousness and failure to state a claim and counting
 18 voluntary dismissal as strike); Heilman v. Deillen, No. CV 14-6298 JVS (FFM), 2017 WL
 19 10591881, at *5 (C.D. Cal. Sept. 18, 2017) ("[I]t would frustrate the purposes of Section 1915(g)
 20 if Plaintiff avoided a strike merely because he, rather than the court, instigated the dismissal of an
 21 action that he acknowledged was nonviable."); Blaisdell v. Hawaii Dep't of Pub. Safety, No. 12-
 22 00554 LEK BMK, 2012 WL 5996797, at *3 (D. Haw. Nov. 30, 2012) (collecting cases) (stating
 23 permitting Plaintiff to voluntarily dismiss complaint would frustrate Congress's purpose in

24 ⁴ In El-Shaddai v. Zamora, the Ninth Circuit held "when [] review[ing] a dismissal to determine whether it counts as
 25 a strike, the style of the dismissal or the procedural posture immaterial." 833 F.3d at 1042.

26 ⁵ In Knapp v. Hogan, the Ninth Circuit held "[i]t is well-settled that, in determining a [Section] 1915(g) 'strike,' the
 reviewing court looks to the dismissing court's action and the reasons underlying it." 738 F.3d at 1109.

27 ⁶ In Harris v. Mangum, the Ninth Circuit held a dismissal counts as a strike when the court dismisses a complaint for
 28 failure to state a claim, grants leave to amend, and the plaintiff fails to amend the complaint. 863 F.3d at 1143.

1 enacting the PLRA, namely, to discourage prisoners from filing baseless lawsuits and to deter
 2 “frivolous prisoner gamesmanship”). Thus, because in both Beeler and Kokor Plaintiff failed to
 3 amend after the Court determined that the complaints failed to state a claim for relief, the
 4 subsequent voluntary dismissal is of no consequence. See Harris, 863 F.3d at 1142 (the failure to
 5 amend, via voluntary dismissal, does “not negate the determination already made by the Court
 6 that the complaint he had filed ... failed to state a claim.”). Consequently, the Pulido-Esparza
 7 Court declared Plaintiff a “three-strikes litigant” based on Spencer v. Beeler, No. 1:13-cv-01624
 8 JLO BAM (E.D. Cal. Sept. 22, 2014); Spencer v. Kokor, No. 1:17-cv-00597 LJO JLT (E.D. Cal.
 9 Apr. 6, 2018); Spencer v. Sherman, No. 1:17-cv-01025 LJO EPG (E.D. Cal. Apr. 25, 2018); and
 10 Spencer v. Kokor, No. 1:17-cv-01561 LJO BAM (E.D. Cal. June 26, 2018).

11 As these cases were decided prior to the filing of the instant action, Plaintiff is a “three-
 12 strike litigant” and is ineligible to proceed in forma pauperis unless he was in imminent danger of
 13 serious physical injury at the time he filed this action on March 9, 2023. Andrews, 493 F.3d at
 14 1053-56. In his complaint, Plaintiff alleges on May 21, 2022, Defendant correctional officer L.
 15 Valdez intentionally, illegally, and maliciously confiscated Plaintiff’s Massey fan with a
 16 retaliatory intent. Defendants Valdez and D. Parra failed to provide written document of a receipt
 17 (CDC Form 1083) for taking Plaintiff’s fan and never refuted this statement in his appeal. Plaintiff
 18 requested that Defendants body cameras be reviewed for possible retaliation. On July 12, 2022,
 19 Plaintiff filed a grievance regarding the fan and requested that it be hot glued and returned to him.
 20 The destruction of Plaintiff’s fan occurred after Plaintiff initiated the grievance on July 12, 2022.
 21 On or about September 10, 2022, Defendant Parra informed Plaintiff that his fan was destroyed
 22 and there was no receipt. Defendant Parra retaliated against Plaintiff by destroying his fan.
 23 Defendants’ conduct was malicious and had an adverse effect on Plaintiff by causing him to lose
 24 his fan and to be placed in a cell without circulated and ventilated air to reduce the dust as
 25 Plaintiff is asthmatic. Due to the toxic air, Plaintiff is susceptible to more medical problems
 26 without a fan.

27 It is clear that Plaintiff has not alleged that he suffered any physical injury as a result of
 28 the allegations set forth in the complaint, Plaintiff has not made a plausible allegation that he was

1 in imminent danger of serious physical injury at the time he filed his complaint. Consequently,
2 Plaintiff has not satisfied the imminent danger exception to three-strikes rule of § 1915(g), and
3 Plaintiff's in forma pauperis status be revoked. If Plaintiff wishes to proceed with this action, he
4 must pre-pay the \$402.00 filing fee in full.⁷

5 **IV.**

6 **RECOMMENDATIONS**

7 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 8 1. Defendants' motion to revoke Plaintiff's in forma pauperis status be granted; and
9 2. Plaintiff be directed to pay the \$402.00 filing fee in full to proceed with this action.

10 These Findings and Recommendations will be submitted to the United States District
11 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **twenty-**
12 **one (21) days** after being served with these Findings and Recommendations, the parties may file
13 written objections with the Court. The document should be captioned "Objections to Magistrate
14 Judge's Findings and Recommendations." The parties are advised that failure to file objections
15 within the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772
16 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

17
18 IT IS SO ORDERED.

19 Dated: **July 3, 2024**

20 
21 UNITED STATES MAGISTRATE JUDGE

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27 ⁷ The Court notes that the filing fee increased from \$402.00 to \$405.00, effective December 1, 2023
28 (<https://www.caed.uscourts.gov/caednew/index.cfm/attorney-info/fee-schedule/>); however, since this case was filed
on March 9, 2023, the fee increase does not apply.